

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 98-0764  
SALES AND USE TAX  
FOR TAX PERIODS: 1994-1996**

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**Issues**

**1. Tax Administration:** Hearing Procedure

**Authority:** IC 6-8.1-5-1, *Ball v. Indiana Department of Revenue*, 563 N.E. 2d (Ind. 1990).

The taxpayer protests the length of time between the Indiana Department of Revenue's receipt of the protest and the date of the hearing.

**2. Sales and Use Tax:** Crushing Equipment

**Authority:** IC 6-2.5-3-2 (a), IC 6-8.1-5-1 (b), IC 6-2.5-5-3, 45 IAC 2.2-4-2..

The taxpayer protests the assessment of tax on crushing equipment, its attachments, and its repair parts.

**3. Sales and Use Tax:** Transportation of Materials

**Authority:** IC 6-2.5-5-3.

The taxpayer protests the assessment of tax on parts used to repair trucks, gasoline, and tires.

**4. Sales and Use Tax:** Equipment Rentals

**Authority:** IC 6-2.5-4-10, IC 6-2.5-2-1.

The taxpayer protests the assessment of tax on certain equipment rentals.

**5. Sales and Use Tax:** Sales to Indiana and its Instrumentalities

**Authority:** IC 6-2.5-5-16, IC 6-8.1-5-1 (c).

The taxpayer protests the assessment of tax on sales to an instrumentality of Indiana

**6. Sales and Use Tax:** Credit for Sales Tax Paid to Illinois

**Authority:** IC 6-8.1-5-1 (c).

The taxpayer requests a credit for sales tax paid to Illinois.

**7. Tax Administration:** Negligence Penalty

**Authority:** IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the assessment of the negligence penalty.

**Statement of Facts**

The taxpayer is an Indiana corporation that operates in demolition, excavating, and related activities. The taxpayer's operations include the following:

- 1) Demolishes buildings and excavates the site.
- 2) Operates a dump site where fees are charged for dumping distress materials.
- 3) Hauls distressed materials to the dump site and charges fees.
- 4) Provides dumpster collection service used in the collection of disposable materials to construction contractors and others where fees are charged.
- 5) Processes distress concrete into usable stone for resale at retail and wholesale.
- 6) Sells scrap steel, sand, clay, and dirt at resale and wholesale.
- 7) Rents equipment

After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use tax, interest, and penalty. The taxpayer protested a portion of the assessment and a hearing was held. Further facts will be provided as necessary.

**1. Tax Administration:** Hearing Procedure

**Discussion**

The taxpayer protests the length of time between the taxpayer's original protest letter and the actual hearing. The department received the taxpayer's protest to the assessment of tax on November 20, 1998. The protest went through the normal departmental procedures prior to its assignment to this hearing officer on February 5, 2001. On February 28, 2001, the hearing officer scheduled the matter for hearing on April 24, 2001. The taxpayer requested a continuance. The rehearing was rescheduled twice at the taxpayer's request. The hearing was finally held on June 25, 2002.

The taxpayer contends that this lapse of time violated the taxpayer's right to due process and a speedy trial. The taxpayer has failed to cite or explain how criminal proceedings are applicable to a civil hearing.

IC 6-8.1-5-1 (c) (1) requires that the department set a hearing on any protest "at the Department's earliest convenient time. . ." The hearing officer originally set the hearing sixteen days after receipt of the file and then granted two taxpayer requests for continuance before holding the hearing. These actions satisfy the statutory requirement that the department hold the hearing at the department's earliest convenient time.

The taxpayer cites *Ball v. Indiana Department of Revenue*, 563 N.E. 2d (Ind. 1990) in support of its contention that it was prejudiced by the lapse of time prior to the hearing. In that case, the Court discusses due process in relation to the original notification of proposed assessment to the taxpayer. The taxpayer makes no protest concerning its receipt of a notification that it owed tax to the state. The *Ball* case did touch on whether or not the collection of taxes should be barred by the doctrine of laches. The Court determined that if the department did not act in an unusually dilatory manner, the doctrine of laches does not bar collection of a tax. There is no indication in this case that the department acted in an unusually dilatory manner. Therefore, the doctrine of laches does not bar the state's further prosecution of the matter.

### **Finding**

The taxpayer's protest is denied.

## **2. Sales and Use Tax:** Crushing Equipment

Pursuant to IC 6-2.5-3-2 (a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The taxpayer's second protest concerns the assessment of use tax on crushing equipment, attachments to the crushing equipment, and repair parts for the crushing equipment. The taxpayer contends that its raw material is the concrete slabs. Since the crusher then acts directly upon the concrete slabs to break them into smaller pieces, the taxpayer considers it integral and essential in the production of the taxpayer's final product, the crushed stone. Therefore the taxpayer contends that the crusher and its repair parts qualify for the directly used in direct production exemption pursuant to IC 6-2.5-5-3.

The taxpayer errs in this conclusion. Rather than performing the first step in the process of producing crushed stone, the crushing equipment is actually tangible personal property used in the taxpayer's service of demolishing buildings, collecting the waste, and hauling the waste away. The law provides no exemption for this use of tangible personal property used in providing a service. The Regulations specifically state at 45 IAC 2.2-4-2 that service providers are liable for the sales tax or the complementary use tax on tangible personal property used in the provision of the service. There is no indication that the taxpayer paid sales tax at the time of the

purchase of the tangible personal property that the taxpayer uses to provide the service. Therefore, the taxpayer properly owes use tax.

### **Finding**

The taxpayer's protest is denied.

### **3. Sales and Use Tax: Transportation of Materials**

#### **Discussion**

The taxpayer protests the department's assessment of use tax on repair parts, gasoline, and tires for the trucks that move the slabs of concrete to the facility where the concrete is processed into crushed stone. The taxpayer contends that the trucks move the product from the first step of the production process, the demolition of buildings, to the next step in the production process, the crushing of concrete into crushed stone at the taxpayer's facility, just like a conveyor built moves work in process in a factory. Therefore, the taxpayer argues that the truck repair parts, gasoline, and tires would qualify for exemption just like the conveyor belt at the factory qualifies for the direct use in direct production pursuant to IC 6-2.5-5-3.

The department, as discussed in issue two, finds that the demolition and preparation for shipping at the demolition sites is not the first step in the production of crushed stone but rather an ancillary activity to the provision of a service. Therefore the comparison of the trucks and their repair parts, tires and gasoline to the exempt conveyor belt moving work in process is inappropriate. The law does not provide any exemption for the protested items.

### **Finding**

The taxpayer's protest is denied.

### **4. Sales and Use Tax: Equipment Rentals**

#### **Discussion**

The taxpayer protests the assessment of tax on certain equipment rentals used in the demolition of a brewery. The front of the brewery is located in Indiana. The silos that were demolished were located in Illinois. The taxpayer contends that since the operations were all Illinois in character, the Indiana sales tax is not due. The taxpayer supports this contention with its statement that it paid Illinois taxes and bargained with Illinois labor unions.

IC 6-2.5-4-10 defines persons who lease tangible personal property as retail merchants making retail transactions. All retail transactions in Indiana are subject to the sales tax pursuant to IC 6-2.5-2-1. In the taxpayer's case, an Indiana corporation rented tangible personal property that was delivered in Indiana. The retail transaction took place in Indiana. The department properly assessed the sales tax.

### **Finding**

The taxpayer's protest is denied.

### **5. Sales and Use Tax:** Sales to Indiana and its Instrumentalities

### **Discussion**

The taxpayer sold stone to a corporation that worked with waste disposal. The taxpayer contends that the sales of stone to this corporation qualified for the exemption provided at IC 6-2.5-5-16 as follows:

Transactions involving tangible personal property, . . . are exempt from the state gross retail tax, if the person acquiring the property, commodities, or service:

(1) is the state of Indiana, an agency or instrumentality of the state, a political subdivision of the state, or an agency or instrumentality of a political subdivision of the state, including a county solid waste management district or a joint solid waste management district established under IC 13-21 or IC 13-9.5-2 (before its repeal); and

(2) predominantly uses the property, commodities, or service to perform its governmental functions.

Pursuant to IC 6-8.1-5-1 (c), the department's tax assessment is prima facie evidence that the tax is owed and the taxpayer has the burden of proving that any assessment is incorrect. As proof that the stone sales qualify for this exemption, the taxpayer offers the corporation's name which includes the name of an Indiana city and the term "waste systems." The corporation's name does not prove that it is a governmental entity, agency, or subdivision. The name also does not prove that the corporation qualified as a solid waste management district pursuant to the applicable statutes. Exempt status relies on whether or not the corporation is actually a part of the government and whether or not the corporation is actually performing government functions. Many corporations include city names without actually being a part of the named city. The department's records indicate that the subject corporation was actually an independent for profit corporation. The taxpayer did not sustain its burden of proof.

The taxpayer also protests that sales to another company qualify for exemption pursuant to this statute. The taxpayer, however, does not offer any evidence in support of this contention. Therefore, the taxpayer does not sustain its burden of proof that the subject sales are not subject to the sales tax.

### **Finding**

The taxpayer's protest is denied.

**6. Sales and Use Tax:** Credit for Sales Tax Paid to Illinois

**Discussion**

The taxpayer protests the assessment of use tax on items that it rented from an Illinois concern. The taxpayer alleges that it paid Illinois sales tax on those items and should receive an Indiana credit for the sales tax paid to Illinois. The taxpayer was unable to provide any documentary evidence substantiating its claim that it paid Illinois sales tax on the rentals. Without any documentary evidence, pursuant to IC 6-8.1-5-1 (c) the taxpayer does not sustain its burden of proving that the assessed tax is not actually due and owing to Indiana.

**Finding**

The taxpayer's protest is denied.

**7. Tax Administration:** Negligence Penalty

**Discussion**

The taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence.

The taxpayer failed to follow the law, regulations, and generally available departmental instructions by failing to register as a retail merchant, to pay sales tax on the clearly taxable rental of an office trailer, and to retain adequate records for the auditor's examination. The department properly imposed the negligence penalty.

**Finding**

The taxpayer's protest is denied.